

## UPPER CLARK FORK STEERING COMMITTEE

*MINUTES – May 6, 1999*

### **MEMBERS PRESENT:**

Gerald Mueller  
Steve Schombel  
Robin Bullock  
John Vanisko  
Jim Quigley  
Brent Mannix  
Shane Worley substituting for John Sesso

Jim Dinsmore  
Bob Benson  
Ole Ueland  
Holly Franz  
Audrey Aspholm  
Jules Waber

### **MEMBERS ABSENT:**

Gary Ingman  
Liz Smith  
Robert Orr  
Martha McClain  
Michael Kennedy

Eugene Manley  
Doug Mood  
Don Peters  
Mike Griffith  
Suzy Peraino

### **VISITORS PRESENT:**

Steve Fry  
Michael Suplee  
Mike McLane  
Shannon Voss  
Jack Stults  
Julie A. McNichol  
Louise Tavenner  
Susan Sakaye  
Will McDowell  
Jim Harris  
Candice West  
Shane Woody  
Paul Callahan

Avista  
MT DEQ  
DNRC  
DNRC  
DNRC  
DNRC—Msla Reg. Office  
Deer Lodge  
NRCS  
Tri-state Council/VNRP  
Msla County Health Dept.  
MT Attny Gen. Office  
Butte/Silver Bow  
Land & Water

The Upper Clark Fork River Basin Steering Committee met Wednesday May 6, 1999, in St. Mary's Center, Deer Lodge, MT.

### **WELCOME:**

**Gerald Mueller** welcomed Committee members and visitors and called the meeting to order. **Kate Walker** was scheduled to speak about the USFWS consultation process regarding Bull Trout and USFS grazing allotments, but she was unable to attend the meeting. She will reschedule and hopes speak at the next committee meeting. Therefore, the agenda for the meeting was as follows:

1. Water Quality Management Activities
2. Natural Resource Damage Lawsuit Update
3. Water Supply Situation

#### 4. State-Avista Negotiations

The minutes for the May 6, 1999, meeting were discussed and approved with one correction. On page 9, third paragraph, the sentence should read, “. . .at risk of being inspected by utility commissions. . .”

#### **ANNOUNCEMENTS:**

Committee members began with the debate as to whether or not House Bill 164 passed in the Legislature. Nobody was sure. Mike McLane said he would check and update everyone with the next mailing.

#### **WATER QUALITY PLANNING:**

##### ***Racetrack Creek Pilot***

**Eric Rieland** of Montana Department of Fish, Wildlife, and Parks (FW&P) has been working with NRCS to see if they can get a group of landowners in cooperation to establish some instream flow reservations on Racetrack Creek Pilot. Unfortunately with the water rights issues on Racetrack Creek it is not a simple task. By doing water conservation midway through the basin, it will be difficult to guarantee that the saved water actually gets to the river mainstream. FW&P is not in the position to enforce instream flows. They will continue to address this problem but can make no guarantees nor state any sort of time period for resolving this conflict.

Eric said that they currently have a project under construction on Racetrack Creek. It is a stream stabilization project on Ted Beck's ranch. Beck is about 1-2 miles upstream from the confluence with the Clark Fork River. They are stabilizing the eroding streambanks and assisting with irrigation diversion replacements. They are designing the channel so that the headgates can receive their allocated water without having continuing maintenance of the stream channel. It will assist in reducing sediment input in Racetrack Creek. It will be incorporated with some riparian management as well.

They are also dealing with the problem of “anchor ice” buildup. This is when a stream freezes from the bottom up and thus floods in the winter times. Sometimes anchor ice is caused by the removal of riparian vegetation in the stream, thus causing the stream to cool down at a quicker rate. Their goal is to get some of that vegetation re-established so the stream can hold more heat in the winter time, and thus have less chance for anchor ice building. They're working on transplanting vegetation to bring back the riparian species. He stated that the streams will still flood, but that this should help on those borderline years

Ole stated 2 options to resolve the instream flow problem as voiced by DEQ:

1. Leasing water from senior water right holders to maintain water in the creek for fish.
2. Creating upstream storage.

Eric stated that one of the things people must realize about upstream storage is that building an impoundment on a channel is a very cumbersome process. On-stream impoundments don't really look that favorable at this time. The other option would be

off-stream impoundments. Then you have to look for either an area that is excavated or that has a natural depression to bring water to, use that area for storage, and then return the water back to the stream channel when needed. One of the difficulties with off-stream impoundments is that you must have the soils and topography that will hold a sufficient amount of water. Another is the high cost of excavating, and that impoundment for water storage is usually prohibited. This is an option that can be investigated, though. Eric did not know the current status of this investigation.

Gerald stressed that there are no easy answers and that all the projects they're working on right now are voluntary.

### ***Warm Springs DFWP Habitat Improvement Project***

**Eric** stated that the FW&P shut the Warm Springs Creek project down and returned the funding to NRCS because they hit contaminated soils. They've been working with EPA and ARCO. At this time, some of the contaminated materials from the sites have been removed so they won't re-enter into the stream if it were to shift or flood.

They are continuing to look at Warm Springs Creek to determine what can be done for stabilization and restoring. They have not put out any requests for proposals but are looking at putting together a preliminary design to stabilize the site. They probably won't start any construction on that project within the next year. There are a lot of procedural loopholes to jump through as well as securing the funding needed.

Ole asked whether or not funding from the MT versus ARCO settlement could be used for Warm Springs Creek. Candace West, an attorney from the Montana Attorney General's Office, mentioned (and explained later on in the meeting) that \$3.2 million from the cash settlement must go to wetlands or riparian enhancement, and thus could possibly be used for Warm Springs Creek.

**Mike Suplee** from DEQ explained a formula to prioritize 303 D streams. When they decide on a formula, they will weigh out the priority of every stream. He thinks that Warm Springs Creek will probably come out as a high priority stream.

### ***Rock Creek Feasibility Study***

**Gerald** explained that the Rock Creek Feasibility Study is an application that the Steering Committee submitted. It would help deal with the degraded middle section of Rock Creek.

**Eric** stated that Rivers Network has unfortunately received a lot more grant applications (over 400) than they had anticipated. Consequently there will be a large number of projects that won't be funded. They won't be able to make a decision until at least June 1. This puts a bind on some of Eric's other funding sources that are required to be spent by June 1.

Eric stated that they have received money from the Montana Association of Conservation Districts with the help of Granite County Conservation District and Grant Application and NRCS. This must be spent by June 1.

Eric said they have had some applications that were not accepted—the most disappointing one was the grant U.S. Fish and Wildlife Service rejected. He has not received in writing the reason why, but he will continue to pursue that.

Eric stated that on projects of this magnitude, you often have a very narrow window during which you can actually collect data or work in a stream channel. We have a consultant who has been selected for the project and all of the information on the contracts to be let once we receive enough funding to pay the consultant. With the cost of the project at approximately \$43,000, our department requires him to have 90% of that in place before he signs a contract. If we don't have the money we won't be able to begin the project this year.

He states that the River Network money was going to provide \$19,000 of that money. He has also put in a supplemental grant to DEQ for EPA funds but has not been notified as to whether or not they'll receive any money.

### ***Rock Creek (near Garrison) Water Lease***

**Eric** stated that we have received a grant from Trout Unlimited. We are also in the running for a grant from EPA, which is handled through Montana's DEQ for 319 funds. This grant is tentatively approved. This water lease project looks like it will be in construction late this summer.

Eric stated the landowners and the department have agreed on a minimum instream flow of 5 cfs as a result of this lease. USGS' estimation of modeling the basin says there will be anywhere from 3-27 cfs available.

Eric explained that Rock Creek is dewatered annually from the second week in August through about mid-September—effecting Brown Trouts migration. The water lease is at the lowest end of Rock Creek. Water from the lease will enable Brown Trout up into Rock Creek and allow a minimum instream flow for what he describes as “aquatic life support”.

### ***Fred Burr Creek Pilot Plan***

**Gerald Mueller** noted that because of bad weather, Jim Dinsmore, Roxanne Lincoln and himself were unable to meet with locals on Fred Burr Creek. They would like to reschedule and hold a barbecue or something in June.

They hope to stress to all those present at the meeting the importance of working together on a voluntary basis. They've heard that they can't use abandon mine monies on this plan but are hopeful to get funds elsewhere.

Mike McLane stated that the Clean Water Action Plan (CWAP) and 319 will be looking for Requests for Proposals (RFPs) in June. Gerald hopes to identify proposed activities so that they can receive some of this money.

### ***Little Blackfoot CWAP Grant***

**Mike McLane** said he sits on a 319 and CWAP review committee with the Montana Watershed Coordination Council. They received a grant application for a Little Blackfoot River watershed, written up by Land & Water, for the Conservation District.

They were proposing to do some planning and some implementation on a couple of watershed tributaries there. Mike said it was ranked relatively high.

However, **Paul Callahan** of Land & Water, stated that he wrote the grant application, and that it was rejected as far as he understands. They were in a rush to submit it. He said it would have resulted in a TMDL if they had been funded. They will reapply and will also try to get some other sources of funding. He said they need to coordinate the interests of the citizens with the funding sources available. Paul stated that they also need to coordinate closer with the Conservation District.

### **NATURAL RESOURCE DAMAGE LAW SUIT UPDATE**

**Candace West**, an attorney for the Montana Attorney General's Office, gave us the latest update on the Natural Resource Damage law suit. She stated that it is a partial settlement between the state of Montana and ARCO. There are two settlements so far.

State and ARCO agreed on resolving some restoration sites claims and **all** compensable damage claims. She clarified that compensable damages were the lost use of those impacted resources for recreation, fishing, hiking, picnicking, water use of groundwater resources (and for the non-use value of those resources as well—value that we place on having those resources available and clean for future generations).

#### **There are three restoration claims that are outstanding:**

1. Anaconda Uplands (there are terrestrial habitat issues left unresolved on Mount Hagen, Smelter hill and Stuckey Ridge). Restoration claims might be negotiated over the summer months.
2. Clark Fork River (anticipate the resolution will take another year.)
3. Alluvial Aquifer in Butte (Area 1)—resolution probably won't be out until 2001.

State of Montana and ARCO signed the \$215 million settlement agreement on June 19, 1998. That settlement is contingent upon the United States, ARCO, the state of Montana, and the tribes agreeing to resolve all issues remaining on the streamside tailings' operable unit, Silver Bow Creek cleanup.

#### **Breakdown of \$215 million Settlement:**

**\$15 million .....** Costs of litigation (scientific studies, injuries, assessment of natural resources, and litigation costs through December 1997.) There is still a balance of \$400,000 that, by agreement, will be put into the Upper Clark Fork River restoration fund.

**\$80 million .....** Silver Bow Creek Remediation (balance is due on a segmented basis. \$10 million of this money is set aside for overruns.)

**\$2 million .....** Land Transfer Value (parcels of land will be transferred along Silver Bow Creek. After remediation is complete, public ownership will allow for additional habitat protection and possible access for recreational purposes.)

**\$118 million (plus interest= \$128 million) .....** Cash (for restoring, replacing, or acquiring similar resources to those which were injured.)

***We still have approximately \$205 million worth of restoration damage claims outstanding.*** The public, however, responded favorably to this settlement and were anxious for restoration to begin.

Candace wanted to clarify the difference between remediation and restoration, as applied to this case:

**Remediation and the cost to remediate**—are the responsibilities which fall on the primary responsible party, ARCO, for the removal of the substances to an acceptable human health and environmental risk level.

**Restoration**—the incremental step to restore resources to the conditions they would have been in before the release of hazardous substances had occurred. This means that in addition to cleaning up, we still have to develop habitat of fish and wildlife, and re-vegetate the riparian area. Remediation removes the hazard, whereas restoration rebuilds habitat.

Candace also made it clear that the provisions for the Natural Resource Claim are for public interests only. Individuals must pursue claims individually.

Candace noted that a second claim between the state of Montana and ARCO was settled and has a final effective date 60 days after the judges signature on April 19, 1999.

**Breakdown of Second Settlement (\$45 million):**

- \$3.9 million .....** U.S. government (for past response costs of Silver Bow Creek)
- \$1.8 million .....** ARCO’s penalty for ignoring Silver Bow Creek cleanup.
- \$1.7 million .....** U.S. government for Natural Resource damages on the Clark Fork River (primarily wetlands damages.)
- \$18.3 million .....** Tribes’ Natural Resource Claims  
**(\$6.2 million** of the \$18.3 million must be spent on developing 800 acres of wetlands or riparian habitat development in the Upper Clark Fork River Basin; **\$1.5 million** must go to Bull Trout restoration in the Upper Clark Fork River Basin)

(Candace wasn’t sure where the remaining money from the settlement must be spent, but she said she’d get the information for us.)

In addition to the cash settlement, ARCO must develop 400 acres of wetlands within 10 years.

The state must also develop 400 acres of wetlands (but don't have to exceed \$3.2 million. (***Note: This \$3.2 million is what Candace indicated earlier saying it is possible this money may be used to restore Warm Springs Creek.***) The state is also responsible for spending \$500,000 of their settlement towards Bull Trout restoration.

## **WATER SUPPLY SITUATION**

**Mike McLane** summarized the water supply situation while reviewing several reports. The reports had not been updated and still showed data from mid-April. He's not sure how the data quantitatively changed through the end of April to the beginning of March.

Overall, the precipitation for April was below average (although there is still some potential to raise the percentages—given the lack of data.) The streamflows were below the norm also, probably because snow levels in the mountains haven't melted yet. The Palmer Drought Index implied that there are no strong indications of a drought.

## **STATE-AVISTA NEGOTIATIONS**

**Jack Stults**, Administrator for DNRC, along with **Steve Fry** of Avista, explained the current State-Avista negotiations.

Jack explained that Avista, formally known as Washington Water Power, had the largest water right in the basin. However, their license was expiring soon and they had to renew that license. Traditionally this is a "contested case" process. Avista tried a new collaborative process. Different issues were approached successfully in this process.

Senate Bill 90 from the 1997 Legislature deregulated the energy industry and raised questions concerning economic and social issues in the basin. Currently, Avista's water rights can only be met 7 of the 10 years and the surrounding area is in jeopardy.

Both Avista and the state of Montana are concerned about this issue—they want to provide certainty to Avista's water rights and certainty to the junior water right holders. To resolve this conflict, the Legislature's Senate Bill 468 created a basin wide blanket temporary closure with a promise to negotiate a water right agreement acceptable by both parties.

In response to the question as to whether or not we have the authority to take over Avista's water rights. Jack explained that there is a very narrow area of legal authority that the Federal Energy Regulatory Commission has over hydropower facilities. This is not something that has any applicability over any other situation. They are required to consider the following issues:

- Wildlife habitat
- Streamflow
- Riparian health
- Social/economic issues

Several years back the Western Governors Association (which Montana is a member of) developed a resolution that says it is their position when issuing licenses for hydropower, FERC is to protect the existing development as well as reasonable future

development. The state believes that they are coinciding with FERC and the Western Governors Association in their protection for the junior water rights holders. Jack emphasizes that this is a very serious issue and that they've only had one meeting to discuss it so far. He states that one major goal is to understand what the folks in the basin want. However, it is necessary to get value out of both sides of the agreement.

Steve Fry, Avista noted that their concern is planning for an uncertain future. It is important and unwise to not give up something without return value. However, values and opportunities are always changing.

After this first meeting, the parties agreed to jointly develop press releases that review and report progress. They will also meet again on June 1, 1999 in Noxon, Montana, at 1:00. That meeting is open to the public. Jack noted that this first gathering was more substantive than expected. Scheduling public informational meetings is perhaps an item for discussion on June 1, 1999.

Jim Dinsmore suggested that besides needing to notify people that this problem exists, we need to outline a process explaining how they can help.

### **NEXT MEETING**

The next meeting will be held at St. Mary's Center in Deer Lodge, on June 24, at 9:00 a.m. Possible topics for the next agenda include:

1. A briefing on the USFWS consultation process regarding Bull Trout and USFS grazing allotments by Kate Walker.
2. A 303d list review from the Upper Clark Fork River to Missoula by Mike Suplee.
3. Avista Update